**U.S. Department of Labor**

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**Issue date: 25Jun2002**

CASE NUMBER: 2000-LHC-2284

OWCP NO.: 07-155360

IN THE MATTER OF

GEORGE H. MORGAN,
Claimant

v.

HALTER MARINE,
Employer

and

LOUISIANA INSURANCE GUARANTY ASSOCIATION, substituting for
RELIANCE NATIONAL INDEMNITY COMPANY,
Carrier

APPEARANCES:

William J. Faustermann, Jr., Esq.
On behalf of Claimant

Collins Rossi, Esq.
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

## DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq.*, brought by George Morgan (Claimant) against Halter Marine (Employer), and Louisiana Insurance Guaranty Insurance Association, substituting for Reliance National Indemnity Company, which is currently undergoing liquidation. (Collectively the "Carrier"). The issues raised by the parties could not be resolved administratively, and the matter was referred

to the Office of Administrative Law Judges for a formal hearing. The hearing was held on April 24, 2002, in Metairie, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced thirty-six exhibits, which were admitted, including: a vocational evaluation by Bobby S. Roberts; various correspondence to Employer's attorney; various correspondence to Employer and Carrier; various correspondence to and from the Department of Labor; medical records from Drs. Jeffery Oppenheimer, David Slagle, and Clifford, Ameduri; medical records from Slidell Memorial Hospital; the deposition of Dr. Oppenheimer; and various Social Security Administration records. Employer introduced eleven exhibits, which were admitted, including: various Department of Labor filings; a functional capacity exam; medical records from Restorative Clinics, and Tulane Orthopaedic Clinic; vocational rehabilitation records from Nancy Favaloro; and medical records from Dr. Gollamudi Reddy.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

## I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. The date of accident/injury was April 13, 1999;

2. The injury occurred in the course and scope of employment, and an employer-employee relationship existed at the time of the accident;

3. Employer was advised of the accident/injury on April 13, 1999;

4. A notice of controversion was filed on February 22, 2000;

5. An informal conference was held on March 3, 2000;

6. Employer paid wage and medical benefits from April 13, 1999, through the date of the hearing.

## II. ISSUES

The following unresolved issues were presented by the parties:

1. Average weekly wage;

2. Reasonableness and necessity of medical treatment;

3. Nature and extent of disability, and date of maximum medical improvement;

4. Entitlement to continuing total disability;

5. Residual wage earning capacity; and

6. Interest, penalties and attorney's fees.

## III. STATEMENT OF THE CASE

### A. Chronology

Claimant testified that he worked as a crane operator for Employer for about three years as a six-a-day worker. (Tr. 12-13). Claimant worked neat Bayou Bonfouca, a navigable waterway, and spent time working on the navigable waters as well as loading cargo. (Tr. 14-16). Claimant's work place injury occurred on April 13, 1999, when he fell after his foot got caught while hopping off the back of a truck, and he landed on his left shoulder, face and hip. (Tr. 13, 18-19). Although Claimant did not lose consciousness, he temporarily lost all feeling from the waist down, and he was moved to Slidell Memorial Hospital. (Tr. 19-20). Diagnostic records from the hospital reflected that Claimant had minimal compression of the superior end-plate of T11 and minimal wedging of T12, as well as multilevel degenerative disc disease. (CX 21, p. 2-3).

The next day Claimant was treated by Employer's physician, Dr. Butler, an orthopaedist, whose initial impression was possible compression fracture at T11 or T12, and possible fracture of the rib cage. (Tr. 21; EX 10, p. 33). Dr. Butler recommended conservative treatment and opined that Claimant was not presently able to return to work. (EX 10, p. 33). A bone scan performed on April 16, 1999, demonstrated abnormal tracer localization within the T11, T12, L2 and L3 vertebral bodies that was likely traumatic in nature. (EX 9, p. 3). After reviewing the results of the bone scan, Dr. Butler concluded that Claimant had compression fractures, and while Claimant could not resume his former job, he could work at a sedentary level after some physical therapy. (EX 10, p. 31). Dr. Butler then referred Claimant to Dr. Reddy, a physical medicine and rehabilitation specialist. (Tr. 21).

More diagnostic tests performed on July 12, 1999 revealed a compression fracture at the central portion of the superior end plate of L2, decreased signal intensity of all discs due to degenerative disease with mild annular bulging commensurate with mild stenosis, and an old fracture at T11. (EX 9, p. 1-2). On July 27, 1999, Dr. Butler related that Claimant was not a candidate for surgery because there was no potential for instability or nerve root compression. (EX 10, p. 13). Instead of surgery, Dr. Butler recommended chronic pain management to monitor Claimant's progress and recommended a referral to a psychiatrist to manage pain. *Id*. Dr. Butler did not think Claimant could resume his former job. *Id*.

Pursuant to Dr. Butler's recommendation, Claimant underwent physical therapy at Slidell Memorial Hospital Outpatient Rehab Services, where on August 18, 1999, Claimant reported continued pain and spasm throughout the thoracic and lumbar regions. (EX 9, p. 5). After several sessions, physical therapist Nicole Crutcher sent Claimant to undergo a functional capacity exam. *Id*. at 6. Discussing the exam with his spouse, Claimant decided not to take his pain medication the night before. (Tr. 106-07). Nevertheless, Claimant's pain became so excruciating that he caved in and actually doubled his consumption of pain medication. (Tr. 106-07; EX 6, p. 5). Claimant's October 5-6, 1999 functional capacity exam results indicated that he was capable of working at a light/medium level of physical demand. (EX 6, p. 5). Claimant had the ability to perform floor to waist lifts of forty-five pounds, sit and walk on a continuous basis, stand frequently, perform elevated work, crawl, do repetitive siting and squatting, and climb on a continuous basis. *Id*.

Following his functional capacity evaluation, Dr. Reddy reported on November 4, 1999, that Claimant was unable to return to his former employment as a crane operator. (EX 9, p. 22). Dr. Reddy opined that Claimant had reached maximum medical improvement and that it was appropriate to discuss his options for returning to work with the following restrictions: no lifting or carrying over forty pounds, no repetitive bending over 1-3 hours, no walking over 5-8 hours, no standing over 3-5 hours, no sitting over 5-8 hours and no kneeling/stooping over 1-3 hours. *Id*. at 22-23. Unhappy with his treatment, Claimant made a request to Donna Hill, the Employer's adjuster, to receive a second opinion evaluation, but Ms. Hill never made any arrangements and refused to take Claimant's calls. (Tr. 24-25). Meanwhile, Claimant returned to work, clocked-in, had a discussion with his supervisor about the type of work he could do, and was directed to clock-out and go home. (Tr. 67). Employer terminated Claimant's compensation benefits which it was paying under the State system after Dr. Reddy released Claimant to return to work (Tr. 21-22).

Seeking a second opinion on his own, Claimant contacted his family doctor, Dr. Weiss, who referred Claimant to Dr. Oppenheimer, a neurosurgeon. (Tr. 25-26). On November 29, 1999, Dr. Oppenheimer examined Claimant and concluded that Claimant had some chronic vertebral body fractures that did not cause neural compression or significant radiculopathy. (CX 24, p. 1). Opining that an operation would not be useful for Claimant, Dr. Oppenheimer referred Claimant to Dr. Ameduri, a specialist in physical medicine and rehabilitation, for intensive physiatry. *Id*. In a return to work slip, dated November 29, 1999, Dr. Oppenheimer stated that Claimant was unable to return to work until January 1, 2000, and he noted that Claimant's care was now in the hands of Dr. Ameduri. (CX 26, p. 1). Claimant paid for his visit to Dr. Weiss and his initial visit to Dr.

Oppenheimer out of his own pocket and Carrier did not reimburse him for those amounts. (Tr. 107-09). After his visit to Dr. Weiss, Claimant obtained a prescription for Oxicontin, which Dr. Ameduri continued at the rate of forty milligrams twice a day. (Tr. 34).

On July 21, 2000, Dr. Ameduri began treatment of Claimant noting a significant loss of the lordotic curve, pain in palpitation the in the paravertebral muscles around L4-5, and a diminished range of motion in the lumbosacral spine. (EX 7, p. 14-15). Dr. Ameduri's initial diagnosis was: back pain category V, discogenic spondyloarthrosis; back pain category VI, stable facet syndrome; back pain category XV, and other rule iliolumbar syndrome. *Id*. at 16. Additionally, Dr. Ameduri opined that Claimant would continue to have "chronic and persistent lifelong back pain due to the underlying degenerative changes caused by and exacerbated by his injuries. *Id*. at 16-17. Accordingly, Claimant was unable to return to any work, and Claimant wold not likely improve over his present state in the future. *Id*. at 17. Diagnostic testing performed on August 3, 2000, revealed tracer locations within the T11-12 L2-3 vertebral bodies described as post-traumatic, narrowing of the L3-4 intervertebral disc with osteophyte formation in multiple thoracic and lumbar levels, an old fracture at L2 and bulging of all lumbar discs consistent with mild stenosis, and compression fracture involving the anterior superior plate of T11. (EX 7, p. 12).

On February 5, 2001, Dr. Ameduri reiterated to Claimant and his wife that Claimant was not presently able to work , but with proper exercise Claimant could resume work in a sedentary position. (CX 17, p. 1). Noting Claimant's assertions and behavior suggesting that he could not sit for more than fifteen minutes, Dr. Ameduri reconsidered his representation to Ms. Favaloro that Claimant would be able to sit for eight hours a day as unrealistic. *Id*. Claimant could still do sedentary work, but he would have to take breaks during the day. *Id*. The same day Dr. Ameduri wrote to Ms. Favaloro explaining that Claimant would only be able to sit for thirty minutes at a time before taking a break, but this limit should increase as Claimant builds up tolerance through an exercise program. (CX 18, p. 1). Dr. Ameduri did not change his recommendation that Claimant could lift up to twenty pounds. *Id*. On March 7, 2001, noting that Claimant went from a sitting to a standing position every few minutes, Dr. Ameduri opined that Claimant did not have enough pathology to suggest he could not sit down and indicated that Claimant's behavior was due to the fact that Claimant was going to court in a few weeks. *Id*. at 19-20.

On March 13, 2001, some fifteen months after his initial visit, Claimant began treatment a second time with Dr. Oppenheimer due to the reported failure of pain management to resolve his problems. (Tr. 55). On May 24, 2001, Dr. Tupler from Delta Imaging , L.L.C., performed an MRI without contrast that revealed: old mild compression fractures of the superior end-plate of T11 and T12; a Schmoral's node near the end-plate of L2; and mild disc bulges at L2-3, L3-4 and L1-2 intervertebral disc spaces. (CX 13, p. 8). Dr. Tupler did not detect any spinal stenosis or any recurrent disc herniation. *Id*. A lumbar myelogram performed on July 17, 2001, demonstrated a mild decrease in the anterior height of T11 and T12 vertebral bodies; mild degrees of central canal stenosis of L2-3, L3-4 and L4-5. *Id*. at 5. A CT of the lumbar spine, post myelogram, from L2 to S1, conducted on July 17, 2001, revealed mild degrees of central canal stenosis at L2-3 and L3-4 secondary to disc bulging at those levels. *Id*. at 6. Claimant also had a mild disc annulus bulge at

L4-5, but the L5-S1 space appeared normal. *Id*. On July 17, 2001, Dr. Oppenheimer reviewed the new diagnostic data acknowledging mild suggestions of neural compression at L2-3 and L3-4, as well as a significant reduction in the T11-12 vertebral body heights which was likely causing Claimant's back pain. *Id*. at 1. Dr. Oppenheimer recommended Claimant undergo a T11-12 kyphoplasty in October. *Id*.

**B. Claimant's Testimony**

Claimant testified that he worked as a crane operator for Employer for about three years as a six-a-day worker. (Tr. 12-13). April 13, 1999, the day of his injury, was the last time Claimant performed any work. (Tr. 13). Claimant testified that his injury occurred when his foot got caught while hopping off the back of a truck and he landed on his left shoulder, face and hip. (Tr. 13, 18-19). Three or four other workers witnessed Claimant's fall. (Tr. 19). Claimant stated that although the fall did not cause unconsciousness, he lost all feeling waist down for a period of time (Tr. 19).

Claimant described his pain as centered around T11-12 with pain "clear up the back of [his] neck." (Tr. 26-27). Claimant reported problems using his right leg because it felt like "fire" below the knee. (Tr. 27). At the hearing Claimant self rated his pain as an eight when not on medication, but with the use of Oxycontin he could obtain a measure of relief. (Tr. 27-28). Claimant also stated that he was restricted in his daily living habits. On a typical day Claimant got out of bed between five and eleven o'clock, ate breakfast, and would then alternate sitting in a recliner and moving about every fifteen to twenty minutes. (Tr. 37-38). Claimant's spouse cleaned, cooked, did yard maintenance, and maintained the house. (Tr. 38). Claimant testified that he quit driving, although he was recently able to make a twelve mile round trip drive to Tylertown. (Tr. 35-36). Claimant was able to attend the hearing because his spouse drove a van that had a bed in the back. (Tr. 36). To counteract his pain Claimant is dependent on forty milligrams of Oxycontin twice a day, and must take sleeping medication. (Tr. 34-35).

Claimant was receiving compensation payments at the rate of $360.00 a week under the State compensation system immediately following his injury, but Carrier terminated those benefits after Dr. Reddy recommended Claimant return back to work. (Tr. 21-22). Claimant did not receive any compensation benefits until November 2000, and during that time he had unpaid medical bills that included a trip to the see his chiropractor, Dr. Schuermann. (Tr. 32-33).

Regarding the jobs Nancy Favaloro recommended in her March 22, 2002 letter, Claimant stated that he could not perform the job as a telephone operator because he would be unable to drive the thirty miles, one way, to McComb, Mississippi. (Tr. 41-43). Claimant did not think he could perform the job as a unarmed security guard because he needed to lay on his side three or four times during the day. (Tr. 47). A job as a customer service representative would not be appropriate because Claimant would have to lay down during the day and neither his potential employer nor potential customers would be accommodating to Claimant laying down during working hours. (Tr. 48). Claimant testified that no job in Slidell was appropriate because it was too far fro him to drive.

(Tr. 48).

Regarding Dr. Oppenheimer's recommendation for kyphoplasty, Claimant testified that he was willing to undergo the procedure to obtain some relief but Carrier would not approve the procedure. (Tr. 57). In the summer of 2001, however, Claimant learned of a different procedure from a friend at the Bonati Institute that involved non-invasive laser surgery, and Claimant would rather undergo that procedure instead of the kyphoplasty. (Tr. 58-59, 70). Dr. Oppenheimer refused to discuss the procedure with Claimant and none of Claimant's physicians have recommended that procedure. (Tr. 62).

For the past year and a-half, Claimant lived in Kokomo, Mississippi, moving there from Slidell, Louisiana where he had worked for Employer. (Tr. 12). Claimant testified that he made the move because his wife had retired, and his mother, who owned the house in Kokomo had died. (Tr. 62).

**C. Testimony of Mary Grissett Morgan**

Ms. Morgan, wife of Claimant, testified that Claimant has trouble functioning as a "warm human being." (Tr. 101-02). Claimant is up and down twenty-four hours a day and cannot ever be comfortable. (Tr. 102). During one twenty-four hour period, Ms. Morgan recorded Claimant getting up and down twenty-two times. (Tr. 102). Claimant never sat straight in a chair, he always reclined or else he was standing. (Tr. 103). Occasionally Claimant went shopping with Ms. Morgan, during which time he either sat on a bench or utilized a wheelchair shopping cart. (Tr. 105).

Concerning Claimant's functional capacity evaluation with Lori Weaver, Ms. Morgan stated that she discussed it with her husband and they agreed that he should not perform the evaluation on medication, but Claimant's back was hurting so bad that he could not go without it and actually doubled up on his medications during the exam. (Tr. 106-07).

Ms. Morgan testified that Claimant's initial visit with Dr. Oppenheimer cost $350.00 and that she had never been reimbursed by Carrier although she had submitted the sum for reimbursement. (Tr. 107-08). Carrier had not reimbursed Claimant for consultation and evaluation with Dr. Schuermann, a chiropractor costing $175.00, and a visit to Dr. Weiss that was never paid. (Tr. 109). Ms. Morgan began to put all medical costs on her Texaco retirement insurance because dealing with Carrier was such hassle. (Tr. 110). Claimant never submitted the last two bills from Dr. Oppenheimer and it was paid by either Claimant or medicare. (Tr. 110). Currently, Carrier is paying Claimant compensation at the rate of $497.67 each week. (Tr. 114).

**D. Exhibits**

**Medical Imaging Report from Slidell Memorial Hospital**

On April 13, 1999, two x-ray views of Claimant chest were taken. (CX 21, p. 1). They revealed a probable left lower lobe atelectatic change. *Id*. There were no definite acute fractures of the ribs and views of the lumbar spine revealed minimal compression of the superior end-plate of T11 and minimal wedging of T12, as well as multilevel degenerative disc disease. *Id*. at 2-3.

**Medical Records from Tulane Orthopaedic Clinic**

On April 14, 1999, Claimant was treated by Dr. James C. Butler, an orthopaedist, at Tulane Orthopaedic Clinic in Slidell, Louisiana. (EX 10, p. 33). A physical exam revealed tenderness in the left and right rib cage area, tenderness in the inferior thoracloumbar junction and in the lumbosacral junction. *Id*. Claimant also had mild spasm and a restricted range of motion. *Id*. Dr. Butler's initial impression was possible compression fracture at T11 or T12, and possible fracture of the rib cage. *Id*. Recommended treatment consisted of a whole body bone scan and drug therapy. *Id*. Claimant was not able to return to work and Dr. Butler opined that if compression fractures were present they would likely be treated conservatively. *Id*.

A bone scan performed on April 16, 1999, demonstrated abnormal tracer localization within the T11, T12, L2 and L3 vertebral bodies that was likely traumatic in nature. (EX 9, p. 3). After reviewing the results of the bone scan, Dr. Butler could not determine for sure whether Claimant had any fractures. (EX 10, p. 31). Although there were likely compression fractures at T11-12, Claimant course of treatment would be conservative and his prognosis was good. *Id*. Although currently unable to return to his former job, Dr. Butler limited Claimant to sedentary activities and after physical therapy he suspected that Claimant would be able to resume his former employment. *Id*.

A MRI of Claimant's lumbar spine performed on July 12, 1999 revealed a compression fracture involving the central portion of the superior end plate of L2. (EX 9, p. 1). Claimant also had decreased signal intensity of all discs due to degenerative disease with mild annular bulging commensurate with mild stenosis. *Id*. An MRI of the thoracic spine performed the same day revealed an old fracture at T11 without any other significant abnormalities. *Id*. at 1-2. On July 27, 1999, Dr. Butler examined Claimant and opined that he was not a candidate for surgery because there was no potential for instability or nerve root compression. (EX 10, p. 13). Instead Dr. Butler recommended chronic pain management and recommended a referral to a psychiatrist to manage pain. *Id*. Dr. Butler did not think Claimant could resume his former job. *Id*.

**Medical Records of Dr. Gollamudi Reddy**

On August 3, 1999, Claimant presented to Dr. Reddy, a physical medicine and rehabilitation

specialist, with complaints of low back pain. (EX 9, p. 4). After conducting a physical exam, Dr. Reddy's impression was that Claimant suffered from chronic low back pain and recommended drug and physical therapy. *Id*.

Dr. Reddy sent Claimant to Slidell Memorial Hospital Outpatient Rehab Services for physical therapy where he was treated for pain and spasm throughout the thoracic and lumbar region. (EX 9, p. 5). By September 3, 1999, Claimant began to complain about bilateral hip pain and right thigh numbness. *Id*. at 7. Nevertheless, Claimant improved his capacity to lift floor to chest from ten pounds to thirty pounds. *Id*. Therapist Crutcher recommended a transition to a work conditioning program for an additional two weeks before making a determination on maximum medical improvement and scheduling a functional capacity examination. *Id*. at 8.

On his September 7, 1999 visit, Dr. Reddy's impression was myofacial pain. (EX 9, p. 9). Dr. Reddy stated that Claimant should remain off from work and he increased Claimant's drug therapy. *Id*. Claimant was to continue therapy for another two weeks, undergo a functional capacity evaluation and begin a self-exercise program. *Id*.

Following his functional capacity evaluation, Dr. Reddy reported on November 4, 1999, that Claimant was unable to return to his former employment as a crane operator. (EX 9, p. 22). Claimant also continued to complain of pain in his low back. *Id*. Dr. Reddy opined, however, that Claimant had reached maximum medical improvement and that it was appropriate to discuss his options for returning to work with the following restrictions: no lifting or carrying over forty pounds, no repetitive bending over 1-3 hours, no walking over 5-8 hours, no standing over 3-5 hours, no sitting over 5-8 hours and no kneeling/stooping over 1-3 hours. *Id*. at 22-23.

**Functional Capacity Exam Performed by Lori Weaver**

Claimant underwent a functional capacity examination on October 5-6, 1999, at Slidell Memorial Hospital Wellness Pavilion. (EX 6, p. 3). Ms. Weaver noted that Claimant was cooperative during testing but noted two inconsistencies in that Claimant's pull force of eighty-six pounds, should have been greater than his push force of ninety-eight pounds. *Id*. at 4. Also, Claimant had difficulty with low level activities that was not consistent with his lower extremity range of motion. *Id*. Ms. Weaver noted a normal range of motion and good strength in the cervical area, upper extremities and lower extremities. *Id*. at 5.

As a result of the exam Mr. Weaver opined that Claimant was able to work at a light/medium level of physical demand. (EX 6, p. 5). Claimant had the ability to: perform floor to waist lifts of forty-five pounds, sit and walk on a continuous basis, stand frequently, preform elevated work, crawl, do repetitive siting and squatting, and climb on a continuous basis. *Id*. Forward bending, kneeling and crouching were limited to an occasional basis. *Id*. Ms. Weaver also indicated that Claimant took pain medication every four hours during testing and increased his pain medication intake on the second day. *Id*. Considering the fact that Claimant's former job required Claimant to occasionally lift one-hundred pounds on an occasional basis, Ms. Weaver did not think that Claimant could resume

his former occupation as a crane operator. *Id*.

**Medical Records and Deposition of Dr. Jeffery Oppenheimer**

On November 29, 1999, Dr. Oppenheimer, a neurosurgeon, treated Claimant for lower, middle and interscapular back pain. (CX 24, p. 1). On a scale of zero to ten, Claimant self-rated his pain at level six. *Id*. After conducting a physical and neurological exam, which were largely normal, Dr. Oppenheimer reviewed the results of Claimant's bone scan, x-rays, and MRIs. *Id*. at 3. Dr. Oppenheimer's impression was that Claimant had some chronic vertebral body fractures that did not cause neural compression or significant radiculopathy. *Id*. Opining that an operation would not be useful for Claimant, Dr. Oppenheimer referred Claimant to Dr. Ameduri for intensive physiatry. *Id*. In a return to work slip, dated November 29, 1999, Dr. Oppenheimer stated that Claimant was unable to return to work until January 1, 2000, and he noted that Claimant's care was now in the hands of Dr. Ameduri. (CX 26, p. 1).

On March 13, 2001, some fifteen months after his initial visit, Claimant returned to the treatment of Dr. Oppenheimer after he did not have any success with Dr. Ameduri's treatments. Claimant complained to Dr. Oppenheimer about low back pain that radiated into the thoracic region. (CX 13, p. 3). Claimant also presented with leg pain, greater in the right leg, that was aggravated by standing. *Id*. Claimant self-rated his leg pain as an eight on a zero to ten point scale. *Id*. A physical exam revealed hyplgesia in the L3-4 dermatome. *Id*. On May 24, 2001, Dr. Tupler from Delta Imaging, L.L.C., performed an MRI without contrast that revealed: old mild compression fractures of the superior end-plate of T11 and T12; a Schmoral's node near the end-plate of L2; and mild disc bulges at L2-3, L3-4 and L1-2 intervertebral disc spaces. (CX 13, p. 8). Dr. Tupler did not detect any spinal stenosis or any recurrent disc herniation, *id*., and Dr. Oppenheimer read the MRI as demonstrating ferenalstaninasis. (CX 36, p. 10).

A lumbar myelogram performed on July 17, 2001, demonstrated a mild decrease in the anterior height of T11 and T12 vertebral bodies; mild degrees of central canal stenosis of L2-3, L3-4 and L4-5. (CX 13, p. 5). A CT of the lumbar spine, post myelogram, from L2 to S1, conducted on July 17, 2001, revealed mild degrees of central canal stenosis at L2-3 and L3-4 secondary to disc bulging at those levels. *Id*. at 6. Claimant also had a mild disc annulus bulge at L4-5, but the L5-S1 area appeared normal. *Id*. Dr. Oppenheimer reviewed this diagnostic data and on July 18, 2001, he noted mild suggestions of neural compression at L2-3 and L3-4, as well as a significant reduction in the T11-12 vertebral body heights, which was likely causing Claimant's back pain. *Id*. at 1. Although he did not think Claimant had significant neuro-compression, Claimant was still complaining of back pain, and Dr. Oppenheimer recommended Claimant undergo a T11-12 kyphoplasty in October. (CX 13, p. 6; CX 36, p. 11). Kyphoplasty is a procedure whereby a high pressure balloon is inflated within the vertebral body elevating the fracture to create a cavity in the vertebral body, which is then cemented. *Id*. at 12. The procedure was only a year old and Dr. Oppenheimer had "fantastic" results in other patients. *Id*. The surgery was "elective,"meaning that Claimant would not die if he was not treated. *Id*. at 17. The results of the surgery, however, are immediate because the cement used is quick drying, and Claimant had a seventy-five percent chance that it would help his condition. *Id*.

at 19-20.

Dr, Oppenheimer determined that Claimant's reports of pain were credible and he did not have any impression that Claimant was exaggerating, malingering or lying. (CX 36, p. 14-15). Although he stated that he was not good at making judgments on a patients physical capabilities, Dr. Oppenheimer stated that Claimant would likely be able to tolerate a one-hour automobile ride. *Id*. at 16. For functional work evaluations, Dr. Oppenheimer would defer to Dr. Ameduri. *Id*. at 16-17. In the absence of surgery, Claimant had reached maximum medical improvement. *Id*. at 18.

**Medical Records of Restorative Clinics**

On August 3, 2000, Dr. John Wyatt treated Claimant in regards to ongoing complaints of low back pain and radiating symptoms down his right leg. (EX 7, p. 12). Electro-diagnostic studies were grossly normal. *Id*. A bone scan revealed tracer locations within the T11-12 L2-3 vertebral bodies described as post-traumatic. *Id*. There was narrowing of the L3-4 intervertebral disc with osteophyte formation in multiple thoracic and lumbar levels. *Id*. An MRI of the lumbar spine showed an old fracture at L2 and bulging of all lumbar discs consistent with mild stenosis. *Id*. A thoracic spine MRI demonstrated a compression fracture involving the anterior superior plate of T11. *Id*. Dr. Wyatt, who performed those tests, stated that they were normal and without any evidence of radiculopathy, but there may be some early mild peripheral neuropathy. *Id*. Nevertheless, Dr. Wyatt recommended continued conservative care because Claimant was continuing to convalesce from his injury. *Id*.

On October 16, 2000, Dr. Ameduri, board certified in physical medicine and rehabilitation, responded to a letter from Claimant's attorney relating that at his initial examination, on July 21, 2000, Claimant presented with significant lower back pain at the iliolumbar ligamentous insertion. (EX 7, p. 14-15). Claimant also had significant loss of his lordotic curve, pain in palpitation the in the paravertebral muscles around L4-5, and a diminished range of motion in the lumbosacral spine. *Id*. at 15. Dr. Ameduri's initial diagnosis was: back pain category V, discogenic spondyloarthrosis; back pain category VI, stable facet syndrome; back pain category XV, and other rule iliolumbar syndrome. *Id*. at 16. A follow-up MRI of the lumbar spine revealed an old fracture at the central portion of the end-plates of L2 and a bulging wall lumbar disc consistent with mild stenosis. *Id*. Dr. Ameduri's recommendation was that Claimant should undergo thoracic and lumbar spine nerve blocks with Dr. Fortier-Benson. *Id*. Additionally, Dr. Ameduri opined that Claimant would continue to have "chronic and persistent lifelong back pain due to the underlying degenerative changes caused by and exacerbated by his injuries." *Id*. at 16-17. Accordingly, Claimant was unable to return to any work, and Claimant wold not likely improve over his present state in the future. *Id*. at 17.

On February 5, 2001, Dr. Ameduri reiterated to Claimant and his wife that Claimant was not presently able to work, but with proper exercise Claimant could resume work in a sedentary position. (CX 17, p. 1). Noting Claimant's behavior and assertions that he could not sit for more than fifteen minutes, Dr. Ameduri reconsidered his statement to Ms. Favaloro that Claimant would be able to sit for eight hours a day as unrealistic. *Id*. Claimant could still do sedentary work, but he would have to take breaks during the day. *Id*. Claimant also complained to Dr. Ameduri about upper back pain.

*Id*. The same day Dr. Ameduri wrote to Ms. Favaloro explaining that Claimant would only be able to sit for thirty minutes at a time before taking a break, but this limit should increase as Claimant builds up tolerance through an exercise program. (CX 18, p. 1). Dr. Ameduri did not change his recommendation that Claimant could lift up to twenty pounds. *Id*.

On March 7, 2001, Claimant returned to Dr. Ameduri complaining that he needed more narcotics to control his pain. (EX 7, p. 19). Claimant also reported that Dr. Sherman found a calcium deposit pinching his nerve and causing radiculopathy. *Id*. After a physical exam showing a decreased range of motion, Dr. Ameduri's impression remained unchanged. *Id*. Noting that Claimant went from a sitting to a standing position every few minutes, Dr. Ameduri opined that Claimant did not have enough pathology to suggest he could not sit down and indicated that Claimant's behavior was due to the fact that Claimant was going to court in a few weeks. *Id*. at 19-20.

On May 17, 2001, Dr. Ameduri reported that Claimant complained bitterly about a reduction in his narcotic medication. (EX 7, p. 21). Although Claimant certainly did have back pain, Dr. Ameduir thought it was exaggerated and that Claimant would be better off without the narcotic medication. *Id*. In response to an inquiry from Claimant's medical case manager, Dr. Ameduri stated on June 26, 2001, that a determination of maximum medical improvement could not be made until a lumbar myleogram was performed as recommended by Dr. Oppenheimer. *Id*. at 25. Dr. Ameduri expressly refused to make any determination concerning Claimant's status regarding his cardiac condition and would refer to Dr. Ahmad. *Id*. Dr. Ameduri did approve two sedentary, non-repetitive, positions identified by Employer's vocational expert. *Id*. at 26.

**Physicians Desk Reference - Oxycontin**

Claimant consumes Oxycontin on a regular basis to control his pain. Oxycontin's therapeutic effect is that it relieves pain without the loss of consciousness, relieves anxiety, created a feeling of euphoria and a feeling of relaxation. (CX 20, p. 1). Oxicontin also produces respiratory depression and depresses the cough reflex. *Id*. It can also cause constipation, miosis, and causes the body to release histamine. *Id*.

**Vocational Rehabilitation Records and Testimony of Nancy Favaloro**

On October 24, 2000, without the benefit of conducting a personal vocational evaluation with Claimant, Ms. Favaloro issued a vocational assessment based on Claimant's deposition, medical records of Dr. Reddy, a functional capacity evaluation and the records of Dr. Butler. (EX 8, p. 4). Ms. Favaloro took into consideration Dr. Reddy's December 20, 1999, work-release form indicating that Claimant was capable of lifting and carrying forty pounds, was able to walk five to eight hours, could stand three to five hours, and could sit for five to eight hours a day. Ms. Favaloro also considered Claimant's October 1999, functional capacity exam, indicating an ability to lift forty-five pounds, the ability to sit and walk continuously, and stand frequently. Based on that information, Ms. Favaloro identified the following jobs as accommodating Claimant's physical limitations:

| | |
|---|---|
| Fuel Desk Clerk | $6.50 per hour |
| Unarmed Security Guard | $6.00 - $7.00 per hour |
| Retail Sales/Hardware Dep't | $4.25 per hour plus commission |
| Production Worker | $8.00 per hour |
| Unarmed Security Officer | $7.05 per hour |
| Unarmed Security Guard | $5.15 - $7.00 per hour |

(EX 8, p. 6-8).

On February 23, 2001, Ms. Favaloro completed a second vocational report with the benefit of having interviewed Claimant and with additional records from Dr. Ameduri. (EX 8, p. 14). Dr. Ameduri reported to Ms. Favaloro on February 5, 2001, that Claimant was able to lift ten to twenty pounds. *Id*. at 17. An achievement test indicated that Claimant's Letter Word Identification score was nearly equivalent to the twelfth grade and his Passage Comprehension score was equivalent to the thirteenth grade, but Claimant's Calculation score was only on grade level 5.6. *Id*.

Based on Claimant's past work history, which included retail sales and overseeing other workers, Ms. Favaloro identified the following "basically sedentary" jobs in Claimant's locality:

| | |
|---|---|
| Order Processor | $6.00 per hour |
| Dental Lab Technician | $6.00 - $6.50 per hour |
| Call Center Associate | $5.25- $6.25 per hour plus bonuses |
| Phone Sales | $7.00 - $8.00 per hour |
| Unarmed Security Guard | $5.75 - $6.00 per hour |
| Communications Officer | $9.00 per hour |

(EX 8, p. 18-19). Dr. Ameduri approved all of these jobs as suitable for Claimant on March 13, 2001. (EX 11; Tr. 125).

Ms. Favaloro testified that the Order Processor reads from a script and answers the telephone to speak with people who want self-help books. (Tr. 126). It was a sedentary position and Claimant would be required to write down information given by customers and would be able to alternate postural positions. (Tr. 126). Dr. Ameduri's statement that Claimant could not sit for eight hours continuously would not affect Claimant's ability to perform the job because the job allowed the worker to alternate postural positions. (Tr. 126-27).

The job as a Call Center Associate entailed selling books for a publishing company in Slidell, Louisiana. (Tr. 127). The position was sedentary and required answering the phone and making hand written orders. (Tr. 127). The job in Phone Sales was a sedentary position at Home Depot fielding calls from contractors making purchases. (Tr. 127-28). The employee is provided training and taught how to look up prices on the computer. (Tr. 128).

The Unarmed Security job, located on the North Shore outside of Slidell, Louisiana,

accommodated the needs of workers who were only able to do sedentary work and entailed gate-type guard duty. (Tr. 128-29). The guards did not apprehend any perpetrators and merely wrote reports. (Tr. 128). The job as a communications officer was with the City of Slidell as the 9-1-1 operator. (Tr. 129). Ms. Favaloro stated that to do this job Claimant would need to work on his typing skills. (Tr. 129-30). Apart from the job as a dental lab technician, which Dr. Ameduri later disapproved, Ms. Favaloro stated that Claimant was capable of performing all these jobs based on his age, education, employment history, and physical limitations. (Tr. 130).

On August 29, 2001, Ms. Favaloro wrote to Employer's attorney indicating that Dr. Ameduri had approved two of five jobs she had sent to him that were sedentary positions without any lifting or repetitive work. (EX 8, p. 27). Those two approved jobs were not identified in the record. Additionally, Claimant moved from Slidell, Louisiana to Kokomo, Mississippi, thus Ms. Favaloro performed another labor market survey on August 29, 2001, to identified jobs in that area. *Id*. Mr. Favaloro indicated that all jobs were consistent with what Dr. Ameduri had approved in the past. *Id*.

| | |
|---|---|
| Telephone Operator (McComb MS) | minimum wage |
| Unarmed Security Guard (Hattiesburg, MS) | $5.25-$6.25 per hour |
| Customer Service Representative (Hattiesburg, MS) | $6.50 - $7.50 per hour |
| Customer Service Representative (McComb, MS) | $7.50 per hour |
| Assembler (MS) | Minimum wage |
| Sewing Machine Operator (Columbia, MS) | $7.00 per hour |
| Call Center Associate (Slidell, LA) | $5.25 - $6.25 per hour plus bonuses |
| Weigh Station Monitor (Slidell, LA) | $7.00 per hour |
| Dental Lab technician Trainee (Slidelll, LA) | $7.50 per hour |
| PBX Operator (Slidell, LA) | $5.50 per hour |

(EX 8, p. 27-32).

On March 22, 2002, Ms. Favaloro performed another labor market survey identifying sedentary activity which Dr. Ameduri indicated Claimant was capable of performing. (EX 8, p. 33). Ms. Favaloro listed:

| | |
|---|---|
| Telephone Operator (McComb, MS) | part-time/minimum wage |
| Unarmed Security Guard (MS) | $5.25 - $6.50 per hour |
| Customer Service Representative (MS) | $6.50 - 7.00 per hour |
| Manager Trainee (Ms) | $1,800.00 monthly |
| Customer Service Representative (MS) | $7.50 per hour |
| Customer Service Representative (MS) | $7.50 per hour |
| Sewing Machine Operator (MS) | minimum wage |
| Presser (MS) | $5.15 per hour plus a piece rate |
| Call Center Associate (Slidell, LA) | $5.25 - $6.25 plus bonuses |
| Dental Lab Technician Trainee (Slidell, LA) | $7.50 per hour |

| | |
|---|---|
| PBX Operator (Slidell, LA) | $5.50 per hour |
| Order Processor (Slidell, LA) | $6.50 per hour plus bonuses |

(EX 8, p. 33-35).

Ms. Favaloro sent the above positions to Dr. Ameduri who approved every position except for the Sewing Machine Operator, Presser, and Dental Lab Technician. (EX 8, p. 37-39). At the hearing Ms. Favaloro testified that the job as a Telephone Operator in McComb, Mississippi, was a sedentary position that entailed operating the telephone for people who use an answering service. (Tr. 132). On occasion, the employee would send faxes or make copies. (Tr. 132).

The job as an Unarmed Security Guard was a gate-guard position that required reporting certain information as vehicles and people entered the area. (Tr. 132). The position also required the employee to walk around the gate to make rounds, but the rounds were made every hour or two and only lasted for twenty minutes. (Tr. 132). Any lifting was less than twenty pounds. (Tr. 133). The next two jobs, a Customer Service Representative and Manager Trainee, were with Washington Mutual Finance Company. (Tr. 133). The customer service position entailed answering the phone and providing information to people trying to make loans. (Tr. 133). The employee would accept payments and deal with collections and people who have not paid. (Tr. 133). The job would allow Claimant to stand and walk at his desk and there was occasional lifting of ten to twenty pounds. (Tr. 134). The Manager Trainee would set up finance payment plans for customers and approve loan applications. (Tr. 134). A couple of time each week the employee would drive to Hattiesburg, Mississippi to meet people and perform collection work. (Tr. 134).

The two customer service positions were at National Cash Advance and Advance America. (Tr. 135). They entailed sedentary work doing data entry, taking loan applications and cashing checks. (Tr. 135). The Call Center Associate job was the same opening Ms. Favaloro found for Claimant the previous year. (Tr. 135). The PBX operator was at Slidell Memorial Hospital, was a sedentary position, and entailed transferring calls to patient's rooms or various hospital departments. (Tr. 136). The job of Order Processor was the same position that Ms. Favaloro had previously identified. (Tr. 136).

On cross-examination, Ms. Favaloro stated that the majority of her work comes from insurance companies and that she testifies in court approximately three times a month on behalf of the defense. (Tr. 140). Ms. Favaloro also stated that she considered Claimant's age (62 years old), and did not believe that it would be more difficult for a older man to obtain a job as opposed to a younger one. (Tr. 143). Additionally, Ms. Favaloro did not consider Claimant's health to be a competitive disadvantage for the positions that she identified because they were sedentary and approved by Claimant's doctor. (Tr. 144). Ms. Favaloro did not take into consideration Claimant's subjective complaints of pain, but merely relied upon what the doctor indicated in determining Claimant's capabilities. (Tr. 147). If Claimant had to lie down three or four time a day then Ms. Favaloro did not think that he could sustain employment. (Tr. 148). In preparation for the case, Ms. Favaloro did not visit any of the perspective employment facilities. (Tr. 148).

**Vocational Report of Bobby S. Roberts**

Mr. Roberts performed a vocational evaluation on behalf of Claimant on March 15, 2001. (EX 1, p. 1). In compiling his report Mr. Roberts relied on medical records from Drs. Ameduri, Oppenheimer, Butler, Schduermann, Ahmad, Fortier-Benson, and a variety of other medical documentation. *Id*. at 2. Mr. Roberts noted Claimant's subjective complaints of pain in his cervical spine, thoracic spine and low back pain that radiated down his right leg. *Id*. at 3. Claimant reported to Mr. Roberts that he was unable to sit on the edge of a chair for more than ten minutes, that he could sit in a recliner for only twenty minutes and that he had standing tolerance of fifteen minutes. *Id*. In addition to his prescription narcotics, Claimant was depressed over his inability to perform the basic tasks of living. *Id*.

Achievement tests revealed that Claimant was a highly skilled reader, but a poor speller and had poor mathematic abilities. (CX 1, p. 4). In a perceptual/neurological assessment, Claimant was twentieth percentile in vision screening, fiftieth percentile in size discrimination, fifteenth percentile in shape discrimination, sixtieth percentile in eye/hand coordination, fifth percentile in eye, hand/foot coordination and high average in color discrimination. *Id*. Unable to complete most of the manual dexterity/motor coordination tests, Claimant was in the thirtieth percentile for machine tending. *Id*. at 5. Fine assembly skills were in the ninetieth percentile for use of the dominant finger and fifty-fifth percentile for use of the non-dominant finger. *Id*. Overall, Claimant had low-average problem solving ability, average reasoning ability and high average visual memory. *Id*.

Mr. Roberts was unable to complete light duty standing work samples due to Claimant's restrictions. (CX 1, p. 5). Claimant was able to complete sedentary models because he was able to change positions every ten to fifteen minutes. *Id*. Based on Claimant's results, Mr. Roberts opined that Claimant was not able to perform sedentary activity as defined by the Department of Labor. *Id*. at 6. Claimant had particular difficulty with sitting, standing and statically flexing at the waist. *Id*.

Addressing Ms. Favaloro's report of February 23, 2001, Mr. Roberts opined that it was based off a functional capacity evaluation that was over sixteen months old and that Claimant's condition had deteriorated since that time. (CX 1, p. 7). Considering the medical evaluation of Dr. Ameduri, Mr. Roberts stated that medical restrictions are limits that should not be exceeded and his actual capabilities were actually quite less. *Id*. Opining that Claimant could not resume his former job, and could not work at the light duty level based on his demonstrated physical ability, Mr. Roberts stated that Claimant was not able to perform sedentary work because of his functional intolerance to sustained sitting. *Id*. at 8. Dr. Roberts viewed Claimant as permanently totally disabled for the remainder of his work life. *Id*.

## IV. DISCUSSION

### A. Contention of the Parties

Claimant contends that his average weekly wage benefit under the Act is $512.17 per week and not the $467.02 that the Employer is currently paying. Claimant also contends that Employer has failed to reimburse him for a $350.00 expense incurred for treatment with Dr. Oppenheimer and an $175.00 expense incurred for treatment with Dr. Schuermann.

Claimant argues that he has established a *prima facie* case of total disability because he is unable to resume his former position as a lead crane operator. Claimant also argues that the opinion of Dr. Ameduri regarding Claimant's ability to return to work is not credible because in October 2000, Dr. Ameduri stated Claimant was unable to do any work, in February 2001, he "flip-flops" in his opinion regarding the length of time Claimant is able to sit, and Dr. Ameduri first approves, and then disapproves, the job as a dental assistant trainee without explanation. Claimant urges the Court to accept his reports of pain as credible and declare him totally disabled. Additionally, Claimant contends that discrediting Ameduri also discredits the vocational reports of Nancy Favaloro. Regardless of her reliance on Dr. Ameduri, however, Ms. Favaloro's reports should be given less weight because she failed to seriously consider Claimant's advanced age and transferability of job skills.

Employer has provided authorization for Claimant to undergo the kyphoplasty surgery with Dr. Oppenheimer. Employer argues that Claimant's calculation of his average weekly wage is based off the Louisiana State provisions for determining compensation rates. Employer contends that Section 10(a) of the Act should not be used because there is no evidence concerning the actual number of days Claimant worked. Rather, Claimant's average weekly wage should be calculated under Section 10(d), which would result in an average weekly wage of $746.52 and a corresponding compensation rate of $497.67.

Relying on the medical reports of Clamant's treating physician, Dr. Ameduri, Employer contends that while Claimant is not capable of returning to his former employment, he is capable of performing some work as demonstrated through the vocational reports of Nancy Favaloro. Employer also argues that Claimant has failed to show entitlement for undergoing a procedure at the Bonati Institute to alleviate his back pain because Claimant's treating physician Dr. Oppenheimer did not feel that it was an appropriate medical procedure and Claimant obtained the information regarding the procedure for a lay person.

### B. Credibility

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, 88 S. Ct. 1140, 20 L. Ed. 2d 30 (1968); *Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce*, 661 F.2d

898, 900 (5th Cir. 1981); *Todd Shipyards Corporation v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962). A claimant's discredited and contradicted testimony is insufficient to support an award. *Director, OWCP v. Bethlehem Steel Corp.*, 620 F.2d 60, 64-65 (5th Cir. 1980); *Mackey v. Marine Terminals Corp.*, 21 BRBS 129, 131 (1988); *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981).

Based on the record as a whole, and my observation of Claimant's demeanor, I find that Claimant is a credible witness. I found no evidence in the record or at hearing where Claimant lied, changed his story or attempted to misrepresent the facts. Specifically, in regards to Claimant's reports of pain, I note that his testimony concerning his physical abilities was corroborated by the testimony of Ms. Morgan. (Tr. 35-38, 101-105). Additionally, Claimant's treating physician, Dr. Oppenheimer, stated in April 2002, that he never had the impression that Claimant was exaggerating, malingering, or lying about his pain. (CX 36, p. 14-15). Rather, Dr. Oppenheimer opined that Claimant's reports of pain were credible based on his diagnostic studies which revealed traumatic chronic body fractures at T11-12 and at L2-3. *Id*. at 7. Similarly, Dr. Ameduri stated on October 16, 2000, that Claimant would have "chronic and consistent lifelong back pain due to the underlying degenerative changes caused by and exacerbated by his injuries." (EX 7, p. 16-17). Dr. Ameduri also opined that Claimant's physical state would not improve in the future. *Id*. at 17. After observing Claimant's behavior on February 5, 2001, Dr. Ameduri wrote to Ms. Favaloro revising his work restrictions to state that Claimant could only sit for thirty minutes without taking a break.[1] (CX 18, p. 1). Likewise, vocational expert Bobby Roberts reported that Claimant was only able to complete sedentary work models because he changed positions every fifteen minutes. (CX 1, p. 5). Other evidence supporting Claimant's credibility is that Lori Weaver, the functional capacity evaluator, noted that Claimant was cooperative during his November 1999 exam and attempted all the activities requested of him. (EX 6, p. 3-4). Apart from two minor inconsistencies, Ms. Weaver indicated that Claimant's performance was consistent throughout her exam. *Id*. at 4. Accordingly, I find sufficient basis in the record to determine that Claimant is a credible witness.

**C. Average Weekly Wage**

Section 10 of the Act establishes three alternative methods for determining a Claimant's average annual earning capacity, 33 U.S.C. § 910(a)-(c), which is then divided by 52 to arrive at the average weekly wage, 33 U.S.C. § 910(d)(1). *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 821 (5th Cir. 1991). Consequently, the initial determination I must make is under which of the

[1] Dr. Ameduri, a specialist in physical medicine and rehabilitation, stated on May 7, 2001, that Claimant did not have enough of a pathology to suggest that he could not sit down and he indicated that Claimant's behavior was due to the fact that he had a pending court date. (EX 7, p. 19-20). On May 17, 2001, Dr. Ameduri also indicated that Claimant was exaggerating his back pain. *Id*. at 21. Dr. Oppenheimer, a neurosurgeon, stated that Claimant's pathology was sufficient to cause his pain behavior. (CX 36, p. 7, 14-15). Given Claimant's consistent reports of pain throughout the record, Dr. Ameduri's earlier statement that Claimant would have "chronic and persistent lifelong pain," and the diagnostic findings by Dr. Oppenheimer, I give little weight to Dr. Ameduri's suggestion of malingering.

alternatives to proceed.

**(1) Section 10(a)**

Section 10(a), which focuses on the actual wages earned by the injured worker, is applicable if the Claimant has "worked in the same employment . . . whether for the same or another employer, during substantially the whole year immediately preceding his injury". 33 U.S.C. § 910(a) (2001). *Empire United Stevedores*, 936 F.2d at 821; *Duncan v. Washington Metro. Area Transit Authority*, 24 BRBS 133, 135-36 (1990). Under Section 10(a) the average weekly wage is calculated by dividing the total earnings of the claimant during the preceding fifty-two weeks by the number of days actually worked, then multiplying that number by 300 for a six day worker, and by 260 for a five day worker. 33 U.S.C. § 910(a) (2001); *Matulic v. Director, OWCP*, 154 F.3d 1052, 1056 (9th Cir. 1998). Section 10(a) of the Act must be explored prior to the application of Sections 10(b) and Section 10(c). *Palacios v. Campbell Indus.*, 633 F.2d 840, 842-43 (9th Cir. 1980), *rev'g* 8 BRBS 692 (1978). Section 10(a) should be applied even though virtually no one in the country works either 260 or 300 day per year and any overcompensation that results was approved by Congress for administrative convenience. *Matulic*, 154 F.3d at 1057. (Citing *Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336, 1342 (9th Cir. 1982)).

Here, Claimant worked the fifty-two weeks prior to his accident, which is "substantially the whole year," making a wage calculation under Section 10(a) appropriate.[2] Claimant's uncontradicted testimony was that he worked six days a week. (Tr. 12-13). By way of correspondence between Claimant and Employer, the parties concluded that Claimant worked 296 days during the prior fifty-two weeks. (CX 2, p. 1). Claimant also submitted a fifty-two week wage report, spanning the period from Monday, April 13, 1998 to Sunday, April 11, 1999. (CX 4). Claimant was injured on Tuesday, April 13, 1999. For the fifty-two week period submitted, Claimant earned a total of $38,848.84,[3] or an average of $131.25 for each day of work. ($38,848.84 ÷ 296). Multiplying Claimant's daily wage by three hundred under Section 10(a), for a six day worker, his average annual earnings are

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[2] Employer's argument that Section 10(d) should be applied to determine Claimant's average weekly wage when Claimant has worked the preceding fifty-two weeks is not supported by the Act. By its express terms Section 10(d) makes a claimant's average weekly wage "one-fifty-second part of his annual earnings." 33 U.S.C. § 910(d)(1) (2001). Sections 10(a-c) contain the formula for determining a claimant's average annual earnings. 33 U.S.C. § 910(a-c) (2001). Although Employer's method of determining Claimant's weekly wages is equitable, and a very similar determination may be made under Section 10(c), Congress provided that Section 10(a) must be applied first, if it can be done "reasonably and fairly," even if it results in some over compensation. *See* Matulic v. Director, OWCP, 154 F.3d 1052, 1057 (9th Cir. 1998) (increasing the days a claimant worked by eighteen percent was appropriate under Section 10(a) and it was error for the ALJ to find that Section 10(a) could not be applied "reasonably and fairly").

[3] The wage records Claimant submitted actually reflect a period of fifty-three weeks, from April 6, 1998 to April 11, 1999. (CX 4).

$39,373.82. Under Section 10(d)(1) this number is divided by 52 weeks, which provides an average weekly wage of $757.18, with a corresponding compensation rate of $504.79.

**D. Reasonableness and Necessity of Medical Treatment**

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a) (2001). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989). Here, Employer stipulated in its brief that the kyphoplasty recommended by Dr. Oppenheimer would be authorized as both reasonable and necessary. Claimant, however, asserted his right at the hearing to undergo treatment at the Bonati Institute for non-invasive laser surgery. The procedure was recommended to Claimant hy a friend, a lay person, and there is insufficient information before this Court to render a decision on whether the procedure is reasonable and necessary as there is no physician recommending the treatment or explaining how such treatment would benefit Claimant.

**1. Medical Authorization**

In *Shahady v. Atlas Title & Marble*, 13 BRBS 1007 (1981), *rev'd on other grounds*, 682 F.2d 968 (D.C. Cir. 1982), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. *Banks v. Bath Iron Works Corp.*, 22 BRBS 301, 307, 308 (1989); *Jackson v. Ingalls Shipbuilding Division, Litto Systems, Inc.*, 15 BRBS 299 (1983); *Beynum v. Washington Metropolitan Area Transit Authority*, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. 33 U.S.C. § 907(d)(1) (2001); 20 C.F.R. § 702.421 (2001); *Atlantic & Gulf Stevedores, Inc., v. Neuman*, 440 F.2d 908 (5th Cir. 1971); *Matthews v. Jeffboat, Inc.*, 18 BRBS 185, 189 (1986). The burden of proof regarding compliance with the authorization requirement is on the employee. *Maryland Shipbuilding & Drydock Co. v. Jenkins*, 594 F.2d 404, 407 (4th Cir. 1979).

Pursuant to Section 7(c)(2) of the Act an employer must authorize medical treatment by a claimant's physician of choice. However, once a claimant has made his initial, free choice of physician, he may change physicians only upon obtaining prior written approval of the employer, carrier, or deputy commissioner. 33 U.S.C. § 907(c)(2); 20 C.F.R. § 702.406. A claimant's right to an initial free choice of physician pursuant to Section 7(b) does not negate the prior request requirement. *Beynum v. Washington Metro. Area Transit Auth.*, 14 BRBS 956 (1982); *Betz v. Arthur Snowden Co.*, 14 BRBS 805 (1981). The employer will ordinarily not be responsible for the payment of medical benefits if the claimant fails to obtain the required authorization. *Slattery Assocs. v. Lloyd*, 725 F.2d 780, 787, 16 BRBS 44, 53 (CRT) (D.C. Cir. 1984); *Swain v. Bath Iron Works Corp.*, 14 BRBS 657, 664 (1982).

Here, Following Dr. Reddy's report on December 20, 1999, that Claimant could return to work with the ability to lift/carry up to forty pounds and the ability to sit an d walk for five to eight hours at a time, Claimant did not think the restrictions accurately reflected his physical ability and he sought a second opinion. (Tr. 23-24; EX 9, p. 23). Claimant called Carrier's adjuster, Donna Hill, who initially indicated that she would approve a second opinion evaluation, but subsequently refused to take any telephone calls from Claimant or persons calling on his behalf. (Tr. 24-25). Claimant received information from Ms. Hill's secretary that Carrier was not going to authorize a second evaluation. (Tr. 25). Subsequently, Claimant visited his family doctor to obtain a referral and Claimant eventually ended up in the care of Dr. Oppenheimer. (Tr. 25). Although Carrier paid for most of Dr. Oppenheimer's treatment, it did not reimburse Claimant for a $350.00 medical expense. Also, after seeking approval from Carrier for a second opinion, Claimant consulted with a chiropractor, Dr. Schuermann, whose bill was $175.00. Accordingly, I find that Carrier initially refused/neglected treatment to Claimant after having knowledge of his situation and find that the $350.00 expense incurred for treatment with Dr. Oppenheimer, and the $175.00 incurred for a consultation with Dr. Schuermann are reimbursable expenses under Section 7 of the Act.

**E. Nature and Extent and Date of Maximum Medical Improvement.**

Claimant seeks continuing temporary total disability benefits from September 16, 1998, and associated medical benefits. Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

**(1) Nature of Claimant's Injury**

After Claimant fell from a truck bed on April 13, 1999, he was taken to the hospital where two x-ray views of Claimant chest were taken. (CX 21, p. 1). They revealed a probable left lower lobe atelectatic change. *Id*. There were no definite acute fractures of the ribs and views of the lumbar spine revealed minimal compression of the superior end-plate of T11 and minimal wedging of T12, as well as multilevel degenerative disc disease. *Id*. at 2-3.

A bone scan performed on April 16, 1999, demonstrated abnormal tracer localization within the T11, T12, L2 and L3 vertebral bodies that was likely traumatic in nature. (EX 9, p. 3). A MRI of Claimant's lumbar spine performed on July 12, 1999 revealed a compression fracture involving the central portion of the superior end plate of L2. *Id*. at 1. Claimant also had decreased signal intensity of all discs due to degenerative disease with mild annular bulging commensurate with mild stenosis. *Id*. An MRI of the thoracic spine performed the same day revealed an old fracture at T11 without any other significant abnormalities. *Id*. at 1-2.

On August 3, 2000, Claimant underwent electro-diagnostic studies which were grossly normal. (EX 7, p. 12). A bone scan revealed tracer locations within the T11-12, L2-3 vertebral bodies described as post-traumatic. *Id*. There was narrowing of the L3-4 intervertebral disc with osteophyte formation in multiple thoracic and lumbar levels. *Id*. An MRI of the lumbar spine showed an old fracture at L2 and bulging of all lumbar discs consistent with mild stenosis. *Id*. A thoracic spine MRI demonstrated a compression fracture involving the anterior superior plate of T11. *Id*. Dr. Wyatt, who performed that tests, stated that they were normal and without any evidence of radiculopathy, but there may be some early mild peripheral neuropathy. *Id*. Claimant was treated conservatively until the pain drove him to revisit Dr. Oppenheimer to see what, if anything could be done to alleviate his pain.

On May 24, 2001, Dr. Tupler from Delta Imaging , L.L.C., performed an MRI without contrast that revealed: old mild compression fractures of the superior end-plate of T11 and T12; a Schmoral's node near the end-plate of L2; and mild disc bulges at L2-3, L3-4 and L1-2 intervertebral disc spaces. (CX 13, p. 8). Dr. Tupler did not detect any spinal stenosis or any recurrent disc herniation, *id*., and Dr. Oppenheimer read the MRI as demonstrating ferenalstaninasis. (CX 36, p. 10). The results of the MRI indicated that a lumbar myelogram was necessary and that was performed on July 17, 2001, demonstrating a mild decrease in the anterior height of T11 and T12 vertebral bodies; mild degrees of central canal stenosis of L2-3, L3-4 and L4-5. (CX 13, p. 5). A CT of the lumbar spine - post myelogram - from L2 to S1 revealed mild degrees of central canal stenosis at L2-3 and L3-4 secondary to disc bulging at those levels. *Id*. at 6. Claimant also had a mild disc annulus bulge at L4-5, but the L5-S1 appeared normal. *Id*. Dr. Oppenheimer reviewed this diagnostic data noting mild suggestions of neural compression at L2-3 and L3-4, as well as a significant reduction in the T11-12 vertebral body heights which were likely causing Claimant's back pain. *Id*. at 1. Although he did not think Claimant had significant neuro-compression, Dr. Oppenheimer recommended Claimant undergo a T11-12 kyphoplasty in October 2001. (CX 13, p, 6; CX 36, p. 11). Accordingly, surgery is pending and Claimant is still undergoing treatment with a view toward improvement, thus, he has not reached maximum medical improvement.

**(2) Extent of Claimant's Disability**

Based on the nature of his injury, Claimant stated that he had problems using his right leg and it felt like "fire" below the knee. (Tr. 27). At the hearing Claimant self rated his pain as an eight when not on medication, but with the use of Oxycontin he would obtain a measure of relief. (Tr. 27-28). Claimant also stated that he was restricted in his daily living habits. On a typical day Claimant got out of bed between five and eleven o'clock, ate breakfast, and would alternate sitting in a recliner and moving about every fifteen to twenty minutes. (Tr. 37-38). Claimant testified that he quit driving, and he was only able to travel long distances because his spouse drove a van that had a bed in the back. (Tr. 35-36). To counteract his pain Claimant is dependent on forty milligrams of Oxycontin twice a day, which creates a feeling of euphoria. (CX 20, p. 1).

On April 14, 1999, orthopaedist Dr. Butler stated that Claimant was not able to return to work due to his injuries. (EX 10, p. 33). After reviewing the results of the bone scan, however, Dr. Butler stated that while Claimant was unable to resume his former job, Claimant could perform sedentary activities after undergoing physical therapy. *Id*.

Claimant underwent a functional capacity examination on October 5-6, 1999, at Slidell Memorial Hospital Wellness Pavilion. (EX 6, p. 3). The exam indicated that Claimant was able to work at a light/medium level of physical demand. *Id*. at 5. Claimant had the ability to: perform floor to waist lifts of forty-five pounds, sit and walk on a continuous basis, stand frequently, preform elevated work, crawl, do repetitive siting and squatting, and climb on a continuous basis. *Id*. Forward bending, kneeling and crouching were limited to an occasional basis. *Id*. Considering the fact that Claimant's former job required Claimant to occasionally lift one-hundred pounds on an occasional basis, Claimant's evaluator did not think that Claimant could resume his former occupation. *Id*. In a return to work slip, dated November 29, 1999, Dr. Oppenheimer stated that Claimant was unable to return to work until January 1, 2000, and he noted that Claimant's care was now in the hands of Dr. Ameduri. (CX 26, p. 1).

Following his functional capacity evaluation, Dr. Reddy reported on November 4, 1999, that Claimant was unable to return to his former employment. (EX 9, p. 22). Dr. Reddy opined, however, that Claimant had reached maximum medical improvement and that it was appropriate to discuss his options for returning to work with the following restrictions: no lifting or carrying over forty pounds, no repetitive bending over 1-3 hours, no walking over 5-8 hours, no standing over 3-5 hours, no sitting over 5-8 hours and no kneeling/stooping over 1-3 hours. *Id*. at 22-23.

On October 16, 2000, Dr. Ameduri, opined that Claimant would continue to have "chronic and persistent lifelong back pain due to the underlying degenerative changes caused by and exacerbated by his injuries. (EX 7, p. 16-17). Accordingly, Claimant was unable to return to any work, and Claimant would not likely improve over his present state in the future. *Id*. at 17. By February 5, 2001, however, Dr. Ameduri reiterated to Claimant and his wife that Claimant was not presently able to work, but with proper exercise Claimant could resume work in a sedentary position.

(CX 17, p. 1). Noting Claimant's statement that he could not sit for more than fifteen minutes, Dr. Ameduri recanted his statement to Ms. Favaloro that Claimant would be able to sit for eight hours a day as being unrealistic. *Id*. Claimant could still do sedentary work, but he would have to take breaks every thirty minutes during the day. *Id*. (CX 18, p. 1). Dr. Ameduri also indicated that Claimant could lift up to twenty pounds. *Id*. On March 7, 2001, Dr. Ameduri noted that Claimant went from a sitting to a standing position every few minutes, and he opined that Claimant did not have enough pathology to suggest such pain behavior. *Id*. at 19-20. On May 17, 2001, Dr. Ameduri opined that Claimant was exaggerating his back pain to obtain narcotic medication. *Id*. On June 26, 2001, Dr. Ameduri stated that Claimant could sit at a sedentary position without doing any lifting or repetitive work. *Id*. at 26.

Although he stated that he was not good at making judgments on a patients physical capabilities, Dr. Oppenheimer stated in April 2002, that Claimant would likely be able to tolerate a one-hour automobile ride. *Id*. at 16-17. For functional work evaluations, Dr. Oppenheimer would defer to Dr. Ameduri. *Id*. at 16-17.

Accordingly, at least one physician has always opined that Claimant is unable to return to work until Dr. Ameduri stated on opined on February 5, 2001, that Claimant could lift up to twenty pounds and sit at a sedentary position that allowed him to take breaks every thirty minutes. In June 2001, Dr. Ameduri further clarified his position by stating that Claimant should not engage in any lifting or repetitive work.

## F. *Prima Facie* Case of Total Disability and Suitable Alternative Employment

### (1) *Prima Facie* Case of Total Disability

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 156 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, Office of Worker's Comp. Programs*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). Here, the parties stipulated that Claimant cannot perform his former job.

### (2) Suitable Alternative Employment

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (188). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996); *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). A finding of disability may be established based on a claimant's credible subjective testimony. *Vessel Repair, Inc.*, 168 F.3d at 194 (crediting employee's reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991)(crediting employee's statement that he would have constant pain in performing another job). An Employer may establish suitable alternative employment retroactively to the day Claimant reached maximum medical improvement. *New Port News Shipbuilding & Dry Dock Co.*, 841 F.2d 540 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294 (1992). Where a claimant seeks benefits for total disability and suitable alternative employment has been established, the earnings established constitute the claimant's wage earning capacity. *See Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984).

The Fifth Circuit has articulated the burden of the employer to show suitable alternative employment as follows:

> Job availability should incorporate the answer to two questions. (1) Considering claimant's age, background, etc.., what can the claimant physically and mentally do following his injury, that is, what types of jobs is the capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? . . . This brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available.

*Turner*, 661 F.2d at 1042-43 (footnotes omitted).

In the case of *Mijangos v. Avondale Shipyards*, 948 F.2d 941, 944-45 (5th Cir. 1991), the Fifth Circuit determined that and ALJ rationally credited an injured worker's reports of pain in finding that the worker was totally and permanently disabled. The employer produced medical evidence revealing the claimant's work limitations, and listed jobs in its facility specifically tailored to those restrictions which were not controverted by any medical experts. *Mijangos v. Avondale Shipyards*, 19 BRBS 15, 18-19 (1986). Even though the alternative employment fell within the claimant's medical limitations, the ALJ credited the claimant's reports of pain and determined that "even the least taxing jobs identified by employer would not allow claimant the flexibility to work given his testimony as to excruciating and constant pain." *Id*. at 19.

As noted *supra*, Part B, I find that Claimant is a credible witness and that his subjective reports of pain are supported by the record. Accordingly, like *Mijangos*, I find that Claimant is incapable of performing any work even though Dr. Ameduri approved numerous positions sent to him by Ms. Favaloro. In the alternative, I find that the positions identified by Ms. Favaloro and approved by Dr. Ameduri are not realistically suitable for Claimant is light of Dr. Ameduri's statement on February 5, 2001, that Claimant would have to take a break every thirty minutes and his later statement in June 2001, that Claimant should not engage in lifting or do repetitive work. I credit Claimant's statements that he must lay down several times a day because of intractable pain, and Ms. Favaloro indicated that Claimant could not maintain employment if he had to lay down on the job.

**G. Conclusion**

Claimant made a credible witness and his subjective reports of pain are well supported by the record. Because Claimant worked "substantially the whole year" proceeding his injury, calculating his wages under Section 10(a) of the Act is appropriate. As a six day worker, Claimant's average weekly wage was $757.18, with a corresponding compensation rate of $504.79. The parties reached an agreement that the surgical kyphoplasty procedure recommended by Dr. Oppenheimer would be authorized as both reasonable and necessary. Because Claimant sought authorization from Carrier to receive a second opinion on his ability to return to work after released by Dr. Reddy, and because carrier refused/neglected to provide a second opinion evaluation, I find that Claimant is entitled to reimbursement for a $350.00 expense incurred for treatment with Dr. Oppenheimer and a $175.00 expense for consultation with Dr. Schuermann. Claimant did not provide sufficient evidence to justify a ruling by this Court ordering Carrier to authorize treatment of non-invasive laser surgery at the Bonati Institute. Based on the nature and extent of Claimant's injuries, I find that he is totally disabled within the meaning of the Act after crediting his subjective reports of pain.

**H. Interest**

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

**I. Attorney Fees**

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

## V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from April 14, 1999, and continuing based on an average weekly wage of $757.18, with a corresponding compensation rate of $504.79.

2. Employer shall be entitled to a credit for all compensation paid to Claimant after April 13, 1999.

3. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act, including the surgical kyphoplasty procedure recommended by Dr. Oppenheimer, but not including, without further evidence of reasonableness and necessity, treatment at the Bonati Institute for non-invasive laser surgery. Employer shall reimburse Claimant $525.00 representing medical expenses from Drs. Oppenheimer and Schuermann.

4. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

5. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
Administrative Law Judge